A **BRUNEI REPORT**

Public Prosecutor v Lim Eng Kiat

B HIGH COURT (BRUNEI) — CRIMINAL TRIAL NO 14 OF 1994
ROBERTS CJ AND ZABAIDAH J
7 FEBRUARY 1995

Criminal Law *— Penal Code (Brunei) s 302 — Murder — Whether there is intention to kill or to cause bodily harm likely to cause death — Whether killing premeditated*

C

Criminal Law *— Penal Code (Brunei) s 304 — Culpable homicide not amounting to murder — Defence of provocation — Relevant test to apply — Penal Code (Brunei) s 300 exception 1*

Evidence *— Burden of proof — Exceptions in Penal Code — Onus on defendant to*
D *prove on balance of probabilities — Evidence Act (Cap 108) (Brunei) s 105*

The defendant was charged with the murder of his wife ('Liaw') by strangling her to death, an offence punishable under s 302 of the Brunei Penal Code ('the Code'). He was alternatively charged with culpable homicide not amounting to murder, an offence punishable
E under the first limb of s 304 of the Code. Liaw was found dead on the floor of her flat with several wounds including a deep abrasion on the front of the neck which indicated strangulation by ligature. The defendant admitted that he had killed Liaw. The court thus only had to decide whether the act of killing amounted to culpable homicide
F and, if so, whether the culpable homicide amounted to murder, or whether it fell within any of the exceptions to s 300 of the Code. In evidence, the defendant insisted that when he put the string around Liaw's neck, he did not mean to kill her, nor to cause her any injury likely to cause death. He said that he only wanted to 'punish her so that she would not overdo things in the future'. The defendant also
G adduced evidence to establish grave and sudden provocation. It was contended that on the day of the killing, Liaw had confessed to adultery and made an insulting reference to the size of his penis. The prosecution argued that there could not have been provocation as contemplated by exception 1 to s 300 of the Code because the
H murder was carefully planned by the defendant and even if it were not, the defendant was not provoked by Liaw in the manner suggested by the defendant as his description of what had occurred was not to be believed.

Held, finding the defendant guilty of culpable homicide not amounting
I to murder:

(1) It was impossible to find that the ligature which caused the asphyxia and death had been applied by accident or otherwise

unintentionally. Its presence and the deep imprint round the neck established that the defendant must have intended to kill Liaw, or at least to cause her such bodily harm as was likely to cause death. The prosecution had thus discharged the burden of proving that the death of Liaw was a culpable homicide as defined by s 299 of the Code.

(2) On the evidence adduced, however, the court was left in doubt that the killing of Liaw was premeditated by the defendant since the court did not consider his supposed motives for it to be adequate, nor his alleged arrangements for it to be convincing. The court was sure that the defendant killed Liaw in a fit of passion, during which he lost control of himself, and that there was no 'cooling-off period'.

(3) Pursuant to s 105 of the Evidence Act (Cap 108), the burden of proving the existence of circumstances bringing the case within any of the exceptions to s 300 of the Code was upon the defendant who must establish the exception on a balance of probabilities.

(4) The defence of provocation would succeed if the provocation were so grave and sudden that the defendant was deprived of his power of self-control and the means he used to retaliate were reasonable in view of the provocation offered. The provocation must be sufficient to deprive a reasonable man of his self-control and the test to be applied is that of the ordinary man of the community in Brunei from which the defendant comes, in this instance the Chinese community.

(5) Liaw's confession of adultery to the defendant could amount to grave and sudden provocation. Further, Liaw made a serious insult about the size of the defendant's penis. Taking into account the surrounding circumstances, the court found that the defendant did receive a grave and sudden provocation and he killed Liaw when it made him lose his self-control and that an ordinary person of the defendant's race, class and background would have been provoked in similar circumstances.

(6) The defendant had not replied to the provocation by using a weapon which was inherently lethal. The court found that the means of retaliation used by him was not an unreasonable one in the circumstances, bearing in mind the provocation which he had received.

(7) The defendant thus succeeded in showing, on a balance of probabilities, that his conduct fell within exception 1 to s 300 of the Code. The defendant was therefore guilty of culpable homicide not amounting to murder and was convicted under the first limb of s 304 of the Code. The defendant was acquitted of the charge of murder contrary to s 302 of the Code.

Cases referred to

Ikau anak Mail v PP [1973] 2 MLJ 153 (folld)
Lorensus Tukan v PP [1988] 1 MLJ 251 (refd)
Othman bin Ahmad v PP [1970] 2 MLJ 176 (folld)
PP v Lasakke [1964] MLJ 56 (refd)
R v Camplin [1978] AC 705; [1978] 2 All ER 168; [1978] 2 WLR 679 (refd)
R v Palmer [1913] 2 KB 29 (folld)
Somwang Phatthanasaeng v PP [1992] 1 SLR 850 (refd)
Tan Cheow Bock v PP [1991] 3 MLJ 404 (refd)

Legislation referred to

Criminal Procedure Code ss 117(2), (3), 170 [Brunei]
Evidence Act (Cap 108) s 105 [Brunei]
Penal Code ss 299, 300, 302, 304 [Brunei]

Ivan Leong (Deputy Solicitor General) (*Rahayu DP Hj Razak* and *Zuraini Hj Sharbawi* with him) for the Public Prosecutor.
ACW Abrahams (*Abrahams, Davidson & Co*) and *DS Sandhu* (*Sandhu & Co*) for the defendant.

Cur Adv Vult

Roberts CJ: The defendant faced the following charge, which was amended during the trial without objection by the defence:

> That you, on 28 March 1994 between 2pm to 3pm at No D1 Seri Pelangi flat, Kampong Berangan, Bandar Seri Begawan, Brunei Darussalam, did commit murder by intentionally causing the death of your wife, Liaw Hong Pen, to wit: you strangled her to death, and you thereby committed an offence punishable under s 302 of the Brunei Penal Code.

The charge, as amended, was put to the defendant, who pleaded not guilty.

At a later stage in the trial, the prosecution sought, without objection from the defence, to add a second charge. This was put to the defendant, who pleaded not guilty to it.

> That you, on 28 March 1994 between 2pm and 3pm at No D1 Seri Pelangi Flat, Kampong Berangan, Bandar Seri Begawan, Brunei Darussalam, committed culpable homicide not amounting to murder (first limb) to wit you strangled Liaw Hong Pen with a string and thus by that act caused the death of the said Liaw Hong Pen and with intention to cause such death and you thereby committed an offence punishable under s 304 (first limb) of the Penal Code.

We consider that we would, in any event, under s 170 of the Criminal Procedure Code (the 'CPC'), have had power to convict a defendant of an offence under s 304 of the Penal Code (the 'PC') if he is charged under

s 302w of the PC. As the defence, quite rightly, did not object, however, we permitted the extra charge to be added. A

The law

The prosecution must prove that the defendant is guilty of the offence charged beyond reasonable doubt. Throughout our judgment, if we express ourselves as satisfied or sure or say that something has been proved or that we have no doubt, we should be taken as intending, in each case, to mean that the fact has been proved beyond reasonable doubt by the prosecution, on which the burden lies throughout. We should add that the prosecution must prove, beyond a reasonable doubt, every element which is essential to a conviction under the relevant section of the PC. B C

Section 300 of the PC sets out those occasions on which culpable homicide is murder :

(a) if the act by which the death is caused is done with the intention of causing death; or

(b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; or

(c) if it is done with the intention of causing such bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature, to cause death; or

(d) if the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

D E

There are exceptions, in that culpable homicide is not murder if the offender: F

(a) is deprived of the power of self-control by grave and sudden provocation; or

(b) in the exercise of good faith of the right of private defence of person or property, exceeds the power given to him by law; or G

(c) is a public servant, or is aiding a public servant, and exceeds the powers conferred upon him by law.

The only evidence which has been led of such a nature that the circumstances of this case could possibly fall within any of these exceptions to s 300 of the PC, is that relating to provocation, which will be considered later. H

Section 299 of the PC states that culpable homicide is committed by anyone who 'causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death'. I

One of the above elements of intention or knowledge must be present. Otherwise an act, even if criminal in nature and causing death, will not

A amount to culpable homicide. The burden of proving such intention or knowledge lies on the prosecution, which may for this purpose rely upon all the circumstances of the case.

The motive which incites the action is not relevant, if that act falls within the above definition and not within any of the general exceptions in B the PC. Nevertheless, as will appear later, the presence of a motive may be important.

By charging murder, the prosecution must establish that the defendant is both guilty of culpable homicide and of that form which is described in the PC as murder. By proving that the defendant intentionally caused the C death, or caused such bodily harm as was likely to cause death, the prosecution will have discharged this burden (though of course there are others).

We have summarized parts of the evidence of some witnesses in the appendix. This should not be regarded as indicating that we have only D taken into account, in reaching our conclusions, that part of the evidence which is so summarized. We have given full and proper weight to all the admissible evidence put before us, both verbal and documentary, whether or not it has been referred to in the summaries.

Even though we may not have mentioned them specifically, we have E also considered, and given appropriate weight, before reaching our conclusions, to any inconsistencies in the evidence of a witness and to any contradictions between the testimony of different witnesses.

Admissibility of statements

F We adopted the alternative procedure, which is often used in Brunei, where no jury or assessors are employed and the trial of a capital case is conducted before two judges, who decide both the facts and the law which apply.

The following four 'statements' were made by the defendant:

G (1) that made by the defendant to Insp Kamariah on 30 March 1994;

(2) that made by the defendant to DSP Wahab on 1 April 1994;

(3) the remarks of the defendant overheard by APO Liaw on 1 April 1994; and

H (4) the unsigned statement of the defendant to Insp Ghulam on 4 April 1994.

The admission in evidence of the statements listed at (2), (3) and (4) above was resisted by the defendant, on grounds set out in a written notice submitted by his counsel at the beginning of the trial. The alternative I procedure was adopted to determine whether the statements were voluntary and accurately recorded.

It is for the prosecution to prove, beyond a reasonable doubt, that each of these three statements was 'voluntary'. This word is defined by

s 117(2) of the CPC as meaning that it was not 'obtained by violence, inducements, threats or oppression by a person in authority'. A

It is sufficient for the defence to show that it is reasonably possible that the statements were not voluntary or accurate. If there is such a doubt, the benefit of this must be given to the defendant.

The defendant, supported by other witnesses and a number of police officers, gave evidence as to the circumstances in which these statements were taken. After this we heard submissions by counsel for the Public Prosecutor and for the defence. B

We later announced that (and this was a finding of fact) we were satisfied that the prosecution had established, beyond a reasonable doubt, that each of the statements was voluntary and accurately recorded and should be admitted in evidence. C

The background

The defendant, Lim Eng Kiat ('Lim'), and Liaw Hong Pen ('Liaw'), who comes from Sabah, were married in Singapore in 1983. There are three children of the marriage, aged 6, 7 and 10. D

The parties lived together at various addresses, moving to Flat D1, Seri Pelangi, some months before the death of Liaw.

About 2pm on 28 March 1994, Lim left the flat, accompanied by Ah Hok, a friend who had been in the flat for much of the morning, his daughter Yene and the amah, Dewi Yulaikah (PW25). Liaw was left alone in the flat. Dewi locked the flat door behind her and took Yene for tuition to the Chung Hwa Chinese School, which was next door to the flat. E

When Dewi and Yene returned to the flat at about 3.30pm, Dewi unlocked the door to the flat. Other keys to it were kept by Lim, Liaw and Ah Kiaw (Teo, PW19) a nephew of Liaw who lived in the flat. When Dewi followed Yene into the flat, they found Liaw lying on the floor. As the forensic evidence later established, Liaw must have been dead at the time. F

As the flat's telephone was damaged, Yene and Dewi went to the next flat, where Yene telephoned her father and her uncle, though she was unable to speak to her father. G

Lim, however, arrived at the flat shortly before the police. Outside it, he met Yene and Dewi. Yene said, 'Mama is bleeding.' The defendant went inside. Liaw was still lying on the floor. Her face was covered with a pillow. H

The police arrived shortly afterwards, probably from about 4.40pm onwards. Photographs of Liaw and of the flat were taken and charge of the investigation was assumed by DSP Wahab soon after.

In his evidence, Lim admitted that he killed his wife. We accept this admission as true. It has limited the scope of our inquiry as to whether the act of killing amounted to culpable homicide and, if so, whether the culpable homicide amounted to murder under s 302 of the PC, or whether the culpable homicide fell within the terms of s 304 of the PC. I

The death of Liaw Hong Pen

Dr PU Telesinghe, the forensic pathologist at RIPAS gave evidence that, about 5.50pm on 28 March 1994, he went to Seri Pelangi Flat D1, at the request of the BSB police station.

At the flat, he met DSP Wahab and found the body of Liaw Hong Pen, a Chinese woman, later identified to him by her husband (the defendant).

He removed the quilt which was covering the body and a pillow from her face. He examined the body and confirmed that the victim was dead. When he examined the body, rigor mortis had begun. He estimated the death of Liaw as having taken place at about 12.30pm to 2.30pm on 28 March 1994. He also found, in Liaw's stomach, some undigested food which suggested that she had taken her last meal about two hours before her death.

He found a number of wounds on the body. These included a deep imprint abrasion, on the front of the neck, across the larynx. The injury to the neck indicated that there had been strangulation by ligature.

The body of Liaw was taken to RIPAS mortuary, where he carried out a post-mortem examination of it the following day, 29 March 1994, at about 2pm. He discovered a large number of injuries, though that which killed Liaw was the circumferential imprint abrasion, in the front of the neck.

He was of the opinion that death was due to asphyxia following strangulation by a ligature round the neck. None of the other injuries, nor the pillow, had caused her death, though he found in all 26 injuries to the body, most of which were superficial.

He believed that there had been a frenzied struggle before the ligature was applied, that there would not have been much external bleeding by Liaw and that he would not have expected there to be much blood on the strangler's shirt.

He thought that there was about three minutes between the application to Liaw's neck of the ligature, which could be rope or string or cable, and the death of Liaw. He did not find anything of the nature of a possible rope at the scene and no fibres on the ligature marks.

Some of the injuries which he found were associated with the strangulation, but 15 or so of them were due to blows with a blunt instrument, or with a fist or a kick.

While many of the injuries could be caused by accident, it is impossible, in our view, to find that the ligature which caused asphyxia and death was applied by accident. Its presence and the deep imprint round the neck establish that whoever applied the ligature must have intended to kill her, or at least to cause her such bodily harm as was likely to cause death.

Dr Telesinghe expressed the opinion that the ligature was applied from the rear of Liaw and by someone standing at her shoulder.

This does not accord with the defendant's evidence, though this was not very clear in some respects. According to Lim, he put the string round her neck after she fell to the ground, the implication being that she was on the ground when the ligature was applied.

In his statement to the police, however, the defendant, describing the struggle to DSP Wahab said, in answer to a question from the DSP:

> So I became angry and immediately pushed her head onto the table and she fought back and I became afraid and straightaway took anything that was nearby. And I took a plastic string which is red in colour and tied the string round her neck when she was on the chair. Because she was fighting and struggling I kicked her chest and she then fell down.

We accept that this reply, so far as it goes, is an accurate statement by the defendant of what happened in the flat, in that the ligature was applied to the wife's neck when she was still in the chair. This agrees with Dr Telesinghe's evidence that the ligature was applied from behind, by someone who was standing, and that he smelt urine on the chair behind the desk. He testified that, where a person is strangled, it is usual for urine to be passed.

According to Dr Telesinghe, there was three minutes between the ligature being applied and the death of the victim. Even if this is an overestimate of time, there must have been a measurable interval between these two matters, during which Lim must have realized that what he was doing was certain to end in Liaw's death.

In evidence, the defendant insisted that, when he put the string round her neck he did not mean to kill her, nor to cause her any injury likely to cause death. He said that he only wanted to 'punish her so that she would not overdo things in the future'.

We do not believe the defendant's explanation in evidence. We have no doubt that the defendant, when he applied the string to Liaw's neck, did so with the intention of killing her, or at least of causing her such bodily harm as was likely to cause death.

The prosecution has discharged the burden of proving that the death of Liaw was a 'culpable homicide' as defined by s 299 of the PC and that this amounted to murder by virtue of s 300 of the PC.

We are satisfied that the defendant did the act which caused the death of the deceased, which the defendant does not dispute. We also find that the injury caused was not accidental or otherwise unintentional — see *Tan Cheow Bock v PP* [1991] 3 MLJ 404.

Burden of showing provocation

Section 300 of the PC defines murder. Exception 1 to that section is in these terms:

> Culpable homicide is not murder if the offender, while deprived of the power of self control by grave and sudden provocation, causes the death of the person who gave the provocation, or causes the death of any other

A person by mistake or accident. The above exception is subject to the following provisos —

...

Explanation. Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

B Section 105 of the Evidence Act (Cap 108) is in the following terms:

> When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him and the Court shall presume the absence of such circumstances.

C The section does not specify what standard must be discharged, whether it is proof beyond reasonable doubt, a standard which the prosecution must satisfy, or the lesser standard of proof on a balance of probabilities.

There are, however, a number of Malaysian authorities, which we are content to follow (for example, *Othman bin Ahmad v PP* [1970] 2 MLJ D 176; *Ikau anak Mail v PP* [1973] 2 MLJ 153) to the effect that the standard of establishing the exception (which we will call 'the defence') of provocation is that of the balance of probabilities.

If the court is left in any reasonable doubt as to the circumstances giving rise to the defence, the benefit must be given to the defendant.

E The final phrase of the section, that 'the Court shall presume the absence of such circumstances' emphasizes where the burden lies and makes it clear that, unless the existence of circumstances which give rise to an exception is raised by the defence, the court should presume that they do not exist.

F *Defence of provocation*

If the defence of provocation succeeds, and the prosecution has proved that culpable homicide amounting to murder has been committed, the offence will be reduced to culpable homicide not amounting to murder, G contrary to s 304 of the PC. Whether the offence will fall under the first or second part of that section will depend on the nature of the act by which the death is caused.

The defence of provocation will succeed if:

(a) the defendant was deprived of his power of self-control;

H (b) the provocation was grave and sudden;

(c) the defendant caused the death of the person who gave the provocation (or the death of any other person by mistake or accident, which does not apply here); and

I (d) the means used by the defendant to retaliate are reasonable in view of the provocation offered.

Under (a) above, homicide which would otherwise be murder is reduced to culpable homicide not amounting to murder (the word 'manslaughter'

is a useful word to describe a killing under s 304 of the PC, though the word is not used) if the provocation was sufficient to deprive a reasonable man of his self-control, not whether it was sufficient to deprive the particular person of his self-control. A

The act must be done while the person doing it is deprived of his self-control by provocation. Thus the deprivation of self-control must continue, in order to benefit a defendant who kills under circumstances of provocation. B

The fatal act should be clearly linked to the passion which arises from the provocation. If the act was done after the passion has had time to cool, it is murder, even if the act were linked to the earlier provocation.

This means that if the attack was planned in advance, provocation would not serve as a defence, however grave the original provocation. Circumstances which induce a desire for revenge are not consistent with provocation, if the conscious formulation of a desire for revenge means that the defendant has had time to reflect. This would mean that the defendant has not suffered a loss of self-control, which must be established if this defence is to succeed. C D

The reasonable man has been defined in *R v Camplin* [1978] AC 705; [1978] 2 All ER 168; [1978] 2 WLR 679 as 'an ordinary person of either sex, not exceptionally excitable or pugnacious, but possessed of such powers of self-control as everyone is entitled to expect that his fellow citizens will exercise in society as it is today'. E

The provocation must be such as will upset a person of ordinary sense and calmness, not one who is unusually sensitive or is hot-tempered.

The test to be applied is the ordinary man of the community in Brunei from which the accused comes, in this instance, the Chinese community. This may mean that standards will vary among races, since some matters which are not particularly provocative in some communities may be serious insults to the members of another. F

This will sometimes mean that the judges, if they come from different races or communities to the defendant, will be obliged, in the absence of evidence, to try to assess how a reasonable man of another race or community would react to a provocation offered to him. This cannot be any easy task, but it is one which courts must undertake, to the best of their ability, as they are often obliged to judge the conduct of others whose reaction and backgrounds are markedly different from their own. G

The test, therefore, under (a) above, is whether such a person, placed in the same situation as the accused would have been so provoked as to lose his self-control. See *Lorensus Tukan v PP* [1988] 1 MLJ 251. H

Under (b) above, words and gestures can amount to grave and sudden provocation, such as will bring an act within the exception.

The mental background created by a previous act of the victim may also be taken into account in ascertaining whether a subsequent act could be said to have caused grave and sudden provocation. I

A This means that provocation can be cumulative (see *PP v Lasakke* [1964] MLJ 56) in the sense that previous acts may bring a defendant to a point at which he loses control because the last act, though insufficient in itself, is the final straw which breaks the back of a camel which is already carrying a heavy load from previous provocations, though the final act of provocation must be of a nature which can reasonably be said to revive the earlier ones — eg a later reference to debt might revive earlier references to money, but it would not revive an earlier accusation of sexual inadequacy.

As to (c) above, there is no dispute. The defendant has admitted in evidence that he caused the death of his wife, Liaw Hong Pen, and that she was the person who delivered the provocation to him.

As to (d) above, it is established that the means of retaliation should bear some relationship to the provocation, though it is not possible to say more than it should not be unreasonable, bearing in mind the gravity of the provocation — eg it would be wrong for a defendant to react to mild words by resort to a deadly weapon.

Was this a premeditated murder?

The prosecution argued that there could not have been provocation of the nature specified above, because:

(a) it was a carefully planned murder by the defendant, and

(b) even if it were not, the defendant was not provoked by his wife in the manner suggested by the defendant, because his description of what occurred is not to be believed.

A number of factors were said to provide a sufficient motive for a planned murder of Liaw by the defendant:

(1) the debts of the defendant combined with the wife's failure to pay him an agreed sum per month;

(2) the possible divorce of the parties, with the necessary consequences of this which would be to his disadvantage;

(3) the jealousy of the husband at the way in which his wife was carrying on with Sgt Puasa; and

(4) a deterioration in the relationship of husband and wife.

The debts

Such evidence as there was on this matter, suggests that the deceased was the dominant partner and that the defendant was a quieter person, inclined to avoid argument with his wife if this were possible. We shall take this into account in assessing the evidence.

It is not in dispute that Lim was heavily in debt, at the time of his wife's death, to the extent of about $4,700 to American Express, and that he would shortly owe $70,000 to Lim Ko Khen (PW30).

It is to be noted, however, that the amounts owed to Lim Ko Khen were not due until 7 February 1994 and 28 March 1994, respectively, and there is nothing to suggest that the amounts would not be paid back to the defendant on the dates which he had agreed with those who had borrowed from him.

Lim himself said that he asked his wife for money to pay off his debts to Amex and the amount which he owed for furniture. He added that she had not paid him the $3,000 a month which was due to him from the rents collected by her on the property which was in her name, though we were not told whether this included properties purchased with her money. He did not admit to any other debts.

On a number of occasions, she had scolded him about his debts and had even ejected him from the flat for his failure to settle them.

The possible divorce

This suggested motive is linked to the arrangement made between Lim and his wife in about 1989, to ensure that the Official Receiver did not seize any of his properties.

A receiving order was made against him in 1988. As a result of advice, the property which was later purchased, using his winnings of about $1m in the lottery, was put in the name of his wife. It was agreed, between him and Liaw, that Lim should receive from the rents of the property (which amounted to not less than $7,000 a month), $3,000 a month from Liaw, to be paid over by her. She was to collect all the rents.

Lim said that he had not received his $3,000 a month for three or four months before his wife's death, though he only asked her for money when he needed it.

It was suggested that, if there was a divorce of the parties, the husband would lose all his real property (which would include his income, presumably) and that one of the reasons for his planning of her death was his fear of such a loss.

Lim's reply to this was that he was not prepared to sign any divorce document until the question of the distribution of property was settled.

The possibility of a divorce was raised by the wife on a number of occasions, though we have not heard her reasons for this and the husband did not apparently regard it as prudent to enquire. According to Lim, the possibility of divorce was mentioned by her before they moved to the new flat. After they had moved to Flat D1 she mentioned this several times. At least once, she suggested that he should sign a 'divorce document', which he did not see and, according to him, would not have agreed to sign anyway, until the question of property had been settled between them.

Sgt Puasa

The husband must at the least have been highly suspicious of his wife's relationship with Sgt Puasa. He should have suspected, from his wife's late

A arrival home, that there was more than a casual relationship between them.

However, it is possible that, however grave his suspicious, he could pretend to himself that nothing was happening, until he could no longer avoid this conclusion. There was may well have concluded that Sgt Puasa
B knew all about the wife's conduct of an illegal lottery, and that it would be better for Lim to turn a blind eye to what was probably happening.

We accept the evidence that Sgt Puasa was a frequent visitor to the flat in the months leading up to the death, though he does not admit this himself.

C We also find that there was an incident, a month or more before her death, in which the husband saw his wife and Sgt Puasa together in a car and that Lim reacted to this in an angry manner.

Relationship of husband and wife

D This had been normal until not long before the parties moved to Flat D1, after which their relationship deteriorated.

For the last two to three months of her life, the wife no longer shared a bedroom with Lim. Sexual intercourse continued to take place between them about once or twice a month, though she did not refuse this.

E There were frequent quarrels between them, often about money and his failure to settle debts which he owed. They no longer spoke often to one another and they seldom took their meals together, though Mr Fang (DW5) testified that the parties had been with him in China in 1993 and had got on well there.

F We have no doubt that the marriage had become unstable in the months before the wife's death and that the parties did not get on well. The wife was the stronger and much wealthier partner. She was not a tactful woman and must have been difficult for Lim to live with.

Actions of the defendant on 28 March 1994

G

It is argued by the prosecution that, impelled by the factors discussed above, the defendant planned to kill his wife in the flat on 28 March 1994 and that, in order to do so, he took steps to ensure that nobody would be in the flat during that afternoon, but his wife.

H The defendant instructed the amah to wait at the school until Yene had completed her tuition. This was unusual, according to the amah, though it was a request repeated by Yene herself on the way to school.

Ah Hok, who had been in the flat for some time that morning, was urged to leave it by the defendant. Ah Hok drove off and saw Lim turn back towards the flat, in his (Ah Hok's) car mirror.

I We are asked to find that the various motives above were sufficient, in the mind of the defendant, to impel him to kill his wife and that he took the necessary steps to ensure that she should be alone when he did so.

We do not consider that the factors which are said to have persuaded him to plan to kill his wife were sufficiently strong to make him do so. Nor did we find that in fact he did so.

It was conceded that he owed to Amex rather more than usual, though he had been in debt to it for larger sums in the past. When Liaw was killed, the debts owed to Lim Ko Khen were not due and Lim had no reason to suppose that those to whom he had lent the money would not repay it to him.

It is debatable as to whether he would be put in a worse position by a divorce, as regards property, than he was already. Indeed, if there was a settlement, his position might well have been expected to improve.

He had long suspected his wife of a relationship of some kind with Sgt Puasa. He may have thought that his wife was carrying on an affair with Sgt Puasa. But we believe that he preferred not to face up to this, unless he was obliged to do so. Until that happened, he would take no action.

The fact that a husband does not get on as well with his wife as in previous years is unfortunately common. It does not by itself provide a reason for killing her, though it may make other motives seem more compelling.

Of course, these factors, though they would not influence a normal person to plan murder, might be said to do so in the case of an abnormal man. Accepting that this is so, we must nevertheless assume in his favour, in the absence of evidence to the contrary, that the defendant would react in a relatively normal manner.

If this was a premeditated killing, did the defendant take the necessary steps to make certain that his wife would be alone in the flat in the afternoon on 28 March 1994, as the prosecution alleges and Lim denies?

It was lottery day, with his wife busy on the phone. We were not told if those who laid bets ever came to the flat, though this was presumably possible. She certainly would have received a number of telephone calls. Lim could not have been sure that his presence in the flat would not be known by one of them. The amah might well, in spite of his instructions to her, have returned from the school next door at any time.

It was, if Lim planned to kill his wife, a very dangerous place and time to carry it out, since Lim might well have been seen in the flat, or entering or leaving it.

The conduct of the husband after the killing is of little assistance in deciding whether the killing was the result of careful planning or carried out on a sudden provocation. In either event, the person responsible for the death would, if he had decided to try to evade detection, have ransacked the drawers in the flat, in an attempt to mislead the police into thinking that the wife had been killed by an intruder. He would have thrown away the shirt and string which he had worn or used at the time of the killing and he would have gone to the garage to change the plug on a car which had been giving him trouble for some time.

A These actions are equivocal and could support both a premeditated killing and one committed in the heat of sudden passion.

We are therefore left in doubt, which we must resolve in favour of the defendant, that the killing of the wife was premeditated by Lim, since we do not consider his supposed motives for it to be adequate, nor his alleged
B arrangements for it to be convincing.

We are sure that Lim killed his wife in a fit of passion, during which he lost control of himself, and that there was no 'cooling-off period'. We next must consider if the husband received sufficient provocation to reduce his offence from murder to manslaughter.

C *Was there sufficient provocation?*

There was no witness to the killing of the wife by Lim, other than the latter. It is therefore necessary, before deciding whether his reasons for the provocation can be believed, to consider his own account of what took
D place.

Lim described how he left the flat with Ah Hok, Yene and the amah on 28 March 1994. He was half way to the main road, on his way to a garage in Seri (to which he later went) to repair his car, when he went back to the flat, as he wanted to get some money from his wife.

When Lim first asked her for money, she did not reply. She was
E sitting at her desk. He said that he had not had his share of the monthly rental for three or four months. When he asked her a second time for money, she replied, 'Don't talk about money'.

She said the divorce document was ready and asked him to sign it, saying that he must get out of the house.

F When he protested about this, she asked him whose house it was. When he replied that it was his, she asked him who put up the money for it? She added that there was nothing in writing about the house ownership, as it was all verbal.

The wife told him that he could move out if he was not happy. Then
G there ensued an argument between them.

In the course of the argument, he said, 'You go out every night. Do you think I do not know about it?'.

She replied, 'Yes, I went out every night and [had sex]. And what is more, your penis is too small and you are no fun'.

H Lim then described the struggle, as he recalled it, though there are gaps and inconsistencies in his story.

He said that after she had spoken to him as described above, she threw a stapler at him, which missed him, as he made towards the desk, having sat at the dining table before.

I He described how his wife had used a pen to hit him in the stomach. It hurt him. Then he had a fight with her and hit her several times. She was standing up and he pushed her back into the chair. Her head hit against the desk. When she tried to get out of the chair, he kicked her. She fell to

the ground and he grabbed a piece of string from somewhere and tied it round her neck from the front.

He added that he was so confused that he could not remember how many times he hit or kicked her.

He described how she hit him with a pen and that this hurt him. However, this was not a serious or sustained attack and should not be regarded as of much importance in assessing the degree of provocation received by the defendant.

When he was cross-examined as to the details of what happened that afternoon, Lim replied that he did not kill her because she refused to give him money for Amex but 'because we had an argument'. This began with a request for money, but included other things as well.

Later, he repeated this, 'I killed my wife because we had an argument and I became angry'. He added:

> I did not kill her because there was a buildup of anger but because the words she used were too shameful for me. I was scolded by her like a dog. And she told me that she had sex with another man and complained about the size of my penis and that hurt my feelings.

The defendant has given as the main reason for the provocation the confession of adultery by the wife and the insulting reference to his penis. Although his name was not mentioned, the context and the circumstances make it clear that she was admitting that she had frequently committed adultery with Sgt Puasa.

A confession of adultery by the wife to her husband can, on the authorities, amount to grave and sudden provocation — see *R v Palmer* [1913] 2 KB 29.

Does the fact that the husband had reason to suspect his wife's conduct beforehand weaken the confession? We do not think that it does, necessarily. Suspicion is not the same as a positive confession of adultery, if the latter induces a loss of self-control.

The confession was coupled with a serious insult about the size of the husband's penis and the allegation that he was not much fun, the natural implication of this being that Sgt Puasa had given the wife more pleasure.

It is not necessary for us to find that adultery did in fact take place, but the evidence was such that the husband had good reason to believe that the wife's admission of it was true.

The confession of adultery, assuming that there were circumstances, to make it credible, could itself amount to grave and sudden provocation. This was aggravated by the insult about his organ and by other factors which may well have affected him.

Although Lim has insisted that he did not kill his wife because of them, we believe that we should also consider the possible effect upon him of the other matters which took place before the confession and insult.

The refusal of the wife to give him any money, so that he could settle his debts, her failure to pay him his income of $3,000 per month, her

A reference to divorce and to the ownership of the house, are all matters that may have affected his temper. Even if they would not, by themselves, have amounted to grave and sudden provocation, they can properly be taken into account in deciding whether or not Lim suffered such provocation.

If Lim's evidence is true, we would find that he did receive such a B provocation, that he killed his wife when this made him lose his self-control and that an ordinary person of the defendant's race, class and background would have been provoked in similar circumstances.

The remaining question is whether the retaliation of the husband bore a proper relationship to the provocation.

C There is, unfortunately, no evidence as to where the piece of string, which Lim used to throttle Liaw, was found by him. He said in evidence that he did not remember. In his favour, the string may have been laying on the desk, which he approached because she was sitting behind it. It is not likely, we think, that Lim would have discovered it lying on the floor, which seemed to be suggested by his description of the struggle between D him and Liaw.

However, we do not believe that Liaw was on the floor at the moment when Lim applied the string to her throat. We accept the forensic evidence that the ligature was applied from behind and while the strangler was standing, which was probably while the wife was in the chair. This E supports the supposition that the string, which was said by Lim to be of the same kind as that used for tying parcels, was on the desk when he took hold of it.

Thus the defendant did not reply to the provocation by using a weapon, which is inherently lethal, though string can be deadly if it is used F in the manner in which the defendant employed it.

Not without some hesitation, we find that the means of retaliation used by the defendant was not an unreasonable one in the circumstances, bearing in mind the provocation which he had received.

We have therefore, found that exception 1 to s 300 of the PC is G satisfied, and that the offence is contrary to the first part of s 304 of the PC, ie manslaughter of the more serious kind, and not murder under s 302 of the PC, provided that the version given as to provocation by Lim is true, or could reasonably be so.

Is the husband's evidence as to provocation to be believed?

H

Is Lim's testimony correct, or was the provocation offered not as he stated and not of a kind such as would cause a loss of self-control in a reasonable person of the defendant's class and race? In other words, do we accept Lim's testimony as true ? See *Somwang Phatthanasaeng v PP* [1992] 1 SLR 850. If we are satisfied that he was lying, and that his wife did not provoke I him as he described, we should reject his defence of provocation, and convict him under s 302 of the PC.

In his first statement to the police (Insp Kamariah) on 30 March 1994, Lim did not admit to killing his wife. He made this admission,

without elaboration, in his conversation with his brother, overheard by APO Liaw, and in his unsigned statement to Insp Ghulam on 4 April 1994.

Only in his statement to DSP Wahab, in answer to one of the latter's questions, did he mention the circumstances of the killing, in the following terms:

> After Ah Hok went away, I was worried. I followed Ah Hok from behind and turned back home. Arrived at about 2.15pm, I immediately went up to the house and I found that my wife was writing numbers on the table. I straight away talked to my wife and asked for money, as much as $3,000, because the money was not given to me about three or four months already, because I wanted to pay American Express and others. My wife said, 'If it's about money, don't talk to me.' So I became angry and immediately pushed her head onto the table and she foughtwby. And I took a plastic string which is red in colour and tied the string round her neck when she was on the chair. Because she was fighting and struggling, I then kicked her chest and then she fell down. I saw that a lot of blood was coming out and I became afraid and went into a room and I took a small pillow and covered her face because she was still alive and I was afraid to look at her face.

In answer to other questions put by DSP Wahab, Lim described Sgt Puasa as the boyfriend of his wife. Lim also mentioned his conversation with Sgt Puasa some two months before, and his quarrel with his wife, after he saw her and Sgt Puasa together in Sgt Puasa's car outside the flat.

Lim also told DSP Wahab that he had won a lot of money in the lottery and that this had been used to buy a house and some flats in the name of his wife.

He did not, in that statement, say anything about the provocation offered to him by his wife, or refer to the other words which she was supposed to have used shortly before her death. Nor, to be fair to him, was he asked any questions about this.

Insp Ghulam, when attempting to take from him a statement after warning, under s 117(3) of the CPC, said to him:

> If there is any fact on which you intend to rely in your defence in court, you are advised to mention it now. If you fail to do so before your trial, the court may draw such inferences, adverse to you, as it may think proper. If you wish to mention any fact now, and you would like it written down, this will be done.

We are in no doubt that this warning was given by Insp Ghulam. The sparse reply given thereafter by Lim suggests that he, on 4 April 1994, did not pay much heed to the warning. He had admitted killing his wife and, at that stage, did not wish to say more. We do not think that it would be reasonable to draw from his silence at that time on the subject of provocation any inferences which are adverse to his credibility on that question.

We have already found that Lim was not telling the truth in his evidence, as to the details of the struggle. This does not mean that we must

A also disbelieve his evidence as to the provocation, though we take his untruths in other matters into account in assessing his credibility on the latter issue.

The testimony of Lim, as to what his wife said, goes much further than his statement to DSP Wahab. The latter, however, did not (and we B do not criticize DSP Wahab for this, since he was at that stage only taking a statement in the course of his investigations) ask Lim specifically why he had become so angry that he killed his wife with the string.

It is to be expected that there must have been a more compelling reason for the killing than a mere refusal of the wife to talk to him about money. While this is not impossible, if the person to whom this was said C was unusually quick-tempered, there must have been something more, leaving aside, of course, the possibility of the murder being premeditated, which we have already rejected.

We have examined the evidence given in the witness box by Lim with some care. We find that in general, even if not in every detail, the story told D by him there matches with, and elaborates upon, what Lim said to DSP Wahab in reply to the latter's questions.

In his testimony, the defendant added considerably to his admissions to DSP Wahab, but he did not contradict them.

Can we therefore conclude, as the prosecution urges us to do, that E the additional evidence of what the wife was supposed to have said was untrue, and that the only reason for the reaction of the husband (once premeditation is ruled out) was the refusal of the wife to discuss money?

We do not suggest that a statement to the police, admitted as having been made voluntarily by a defendant and accurately recorded, can never F show that later evidence, which does not accord with it, is untrue.

In this instance, however, DSP Wahab did not ask the defendant if there was any additional reason, other than a dispute as to money, why Lim killed his wife. In his evidence, Lim advanced a number of other reasons, in addition to the ones he had given to DSP Wahab. There was G thus an amplification of those reasons, rather than a contradiction of them.

We therefore accept that it is reasonably possible that Liaw did utter the words attributed to her in evidence by the defendant.

We note that there is other evidence, led by the prosecution, which suggests that Lim was in debt, that divorce had been discussed, and that H he was suspicious of her relationship with Sgt Puasa. All of this make it more likely that in the course of a bitter argument, Liaw said more than was indicated in Lim's earlier statement to DSP Wahab.

Conclusion

I The defendant faces two charges, one of culpable homicide amounting to murder under s 302 of the PC, and one of manslaughter under the first part of s 304 of the PC.

We are satisfied that:

(1) the prosecution has proved, beyond a reasonable doubt, that the defendant killed his wife, Liaw Hong Pen, on 28 March 1994 and that the act which caused her death was murder, as this is defined in s 300 of the PC;

(2) the defendant has succeeded in showing, on a balance of probabilities, that his conduct falls within exception 1 to s 300 of the PC;

(3) since the killing of Liaw Hong Pen was carried out with the intention of causing death, or such bodily injury as was likely to cause death, the defendant should be convicted under the first part of s 304 of the PC; and

(4) the defendant should be acquitted of the charge of murder contrary to s 302 of the PC.

The penalty for an offence against the first part of s 304 of the PC is prescribed by the section itself. We are obliged to pass on the defendant a sentence of imprisonment for life, which we now do.

Order accordingly.

Reported by Kevin Ooi